U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 15Aug2002

CASE NO.: 2001-LHC-1483

OWCP NO.: 15-42181

IN THE MATTER OF:

STEVEN SANDERS,

Claimant

v.

RAYTHEON SERVICES,

Employer

and

LIBERTY MUTUAL INSURANCE CO.,

Carrier

APPEARANCES:

GEORGE P. SURMAITIS, ESQ.

For The Claimant

KURT GRONAU, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Defense Base Act, 42 U.S.C. § 1655, et seq., an extension of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Steven Sanders (Claimant) against

Raytheon Services (Employer) and Liberty Mutual Insurance Company (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on April 18, 2002, in Las Vegas, Nevada. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 22 exhibits, Employer/Carrier proffered 15 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record. [1]

Post-hearing briefs were received from the Claimant on June 26, 2002 and the Employer/Carrier on June 20, 2002. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That Claimant injured his left shoulder on August 28, 1997.

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That Employer was notified of the accident/injury on August 30, 1997.

5. That an informal conference before the District Director was held on January 4, 2001.

6. That Claimant received temporary total disability benefits from November 19, 1997 through October 4, 2000, at a compensation rate of $285.55 for 151 weeks.

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[1] References to the transcript and exhibits are as follows: Transcript: Tr.___ ; Claimant's Exhibits: CX-___; Employer/Carrier Exhibits: EX-___; and Joint Exhibit: JX-___.

7. That Claimant's average weekly wage at the time of injury was $429.76.

8. That Claimant reached maximum medical improvement for his left shoulder injury on June 18, 1998.

II. ISSUES

The unresolved issues presented by the parties are:

1. Whether Claimant has reached maximum medical improvement for his psychiatric condition.

2. Whether Claimant is entitled to permanent partial disability.

3. Whether Employer/Carrier have established suitable alternative employment.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant worked as a painter for Employer until 1998, when he injured his left shoulder at work. (Tr. 120-121). Dr. Herr performed surgery to repair Claimant's rotator cuff, but Claimant still suffers from discomfort, occasional sharp pains and has difficulty sleeping and laying on his left side. (Tr. 122).

Claimant has worked as a painter most of his life and has never been fired from a job. Currently he is not working, but since his injury he has been performing odd jobs for neighbors, such as yard work and running errands, to earn rent money and continues to do so through recent times. (Tr. 121-123, 125). On cross-examination, Claimant testified he earns from $100 to $200 per week doing odd jobs. (Tr. 135). After his surgery, he worked at Treasure Island for a short time as a painter. He was asked to paint lines in the parking lot and use a paint roller with extensions to paint walls, but he was physically incapable of doing so. Claimant could not control the rollers due to his shoulder injury, nor could he lift and carry the 5-gallon paint buckets as required. (Tr. 123-124).

Claimant testified he started receiving help finding a job

after he left Treasure Island. He enrolled at the Interior Design Institute in 1998 or 1999. His studies lasted ten to twelve months. Claimant found the work enjoyable and received good grades, mostly A's, in the beginning, although the classes got tougher as they became more involved. (Tr. 124-125). Claimant passed all of his classes except one computer course which he did not complete and one window designs course which he passed on the second try. (Tr. 125-126).

Claimant "constantly" looked for jobs while attending school. He testified his classes often visited various department stores and design companies, and while they were there he would apply for jobs. He testified he started applying for jobs about half way through his schooling. Claimant became aware of job openings by "getting feelers out there" and being exposed to different stores, firms and companies. (Tr. 126-127). Claimant also began working with Ms. Barbara Davis at the Design Institute, following through with leads she provided him. Claimant testified Ms. Davis mailed him job openings and he turned around and sent the employers introduction letters and resumes. He stated he always followed up by calling the employer back after a few days to make sure they received his resume and to ask "what they had thought." (Tr. 128). On cross-examination, Claimant stated he was not informed of the nature of the job placement services provided by Dr. Generaux-Verre and Miss Danise Hale, and only the school had told him of a job placement program. He did state Miss Hale helped him with his job search, however, no one represented to him at any time that they would find him a job. (Tr. 140-141).

Claimant testified he pursued all leads given to him and in total he applied to well over thirty jobs. He concurred with Miss Hale's report that he sent out 29 applications, stating that would be a minimum number. Claimant testified he would have accepted a job if he had received an offer, but it has been several months since he had an interview. He continues to search for a job, contacting new employers and resubmitting his resume to employers to which he previously applied. (Tr. 127-129). Claimant testified he found his talents in blueprinting and designing of home remodeling projects so he has applied to various design companies, engineering and architectural engineering firms, as well as the decorating centers of the major stores such as Sears and Home Depot. (Tr. 129). On cross-examination, Claimant testified he did not know the Design Institute offered lifetime placement assistance and that it had been a while since he has been there to look for leads. However, he does continue to check the classified ads on a weekly basis for any job openings. (Tr. 135-136).

On further cross-examination, Claimant stated Ms. Davis informed him La-Z-Boy was offering an orientation program to interested students. Claimant expressed interest and the owner allowed him to attend the orientation even though he had already missed the first day's session. (Tr. 136). He told the owner at the beginning that he would not be able to attend the last session because he had an appointment with Dr. Nora. Claimant stated the owner did not seem to mind, as the last day only entailed a half-day tour of La-Z-Boy's Rainbow store. Therefore, Claimant went to three days of orientation and visited Dr. Nora instead of attending the last day. Claimant testified he did not place any significance on his meeting with Dr. Nora and was unaware that if he missed the last day of orientation he would not be hired. He did not know it would make a "crucial difference at that point." (Tr. 137). On re-direct examination, Claimant testified he followed up with the La-Z-Boy position, returning two days later to pick up a check and ask if any hiring decisions had been made. He was told if they were interested they would call him, but they never did. (Tr. 142). Claimant stated La-Z-Boy paid the students $75 per day to attend the orientation and admitted that he passed up the money to visit Dr. Nora the last day. (Tr. 143).

Claimant testified in the field of interior design it is necessary to carry sample books that contain samples of different fabrics, colors and materials. These books measure twelve inches wide, twenty-four inches long and twelve inches thick. Claimant estimated the books weigh about thirty pounds. He stated they are essential for outside sales designers who go into individual's homes. (Tr. 129-130). However, on cross-examination, Claimant testified he assumes he could carry a sample book with his right arm and stated he has not picked up a book, except maybe one time in class. Claimant further stated he did not mean to imply he could not work as an interior designer because of the sample books as he does not know if that would be a determinative factor or not. (Tr. 137-138).

Claimant testified he first noticed something was wrong with him in the middle of his schooling at the Design Institute. He stated he felt as if his life was not moving, he had trouble concentrating and focusing and finally decided to get help from Dr. Nora. Claimant only became aware of his depression and its effects on his life through what his doctors have told him. (Tr. 130-131). He testified he has become antisocial and reclusive, a significant change from his usually extroverted personality. Claimant sometimes stays in his house for days at a time, the most recent occasion was only three weeks before the hearing. He also cries and has had suicidal thoughts. His self-esteem is at

an all-time low as a result from all the rejection letters he received from employers. Claimant has little ambition to finish things, and at the instant hearing testified he felt scared, nervous and insecure. (Tr. 132-133). However, Claimant testified on cross-examination that no one specifically told him to get help, only that the topic had arisen in conversation with Dr. Generaux-Verre. (Tr. 139). He believes his depression would improve if he found a full-time job as an interior designer because then he would feel productive. (Tr. 141).

Claimant has no project management experience and his computer-aided design experience is limited to a five-week introductory course at the Design Institute. He has no other prior or subsequent work experiences. Claimant is incapable of lifting objects with his left arm, as he cannot lift them above shoulder level without dropping them or causing him pain. (Tr. 133-134). On cross-examination, he testified no one at the Design Institute had told him they did not want him back for a second year; he only received that information from Dr. Generaux-Verre. He added that Ms. Wolfe, the owner of the Design Institute, was scheduled to teach two of his classes but she only taught him one day because other instructors taught the classes for her. (Tr. 140, 142-143).

The Medical Evidence

John Herr, M.D.

Dr. Herr is a board-certified orthopedic surgeon who specializes in knee and shoulder surgery. He testified by deposition on December 7, 1998. (CX-12, pp. 260, 263). He initially saw Claimant on September 18, 1997, on a referral from Carrier. Claimant told Dr. Herr he had rolled out of his bed, fallen two and one-half feet and landed on the tip of his left shoulder. Employer's medics initially diagnosed him with a left shoulder contusion but Dr. Herr diagnosed Claimant with chronic rotator cuff tendonitis and early adhesive capsulitis of the left shoulder. This was compatible with the early diagnosis and Claimant's medical history. (CX-12, pp. 267-270). Dr. Herr ordered an MRI of Claimant's shoulder because the injury was already three weeks old and Claimant had significant complaints. The MRI revealed a full-thickness tear of the rotator-cuff in Claimant's left shoulder. (CX-12, pp. 272, 275, 374).

Dr. Herr testified his treatment goal was to make Claimant's shoulder asymptomatic. Non-operative treatment resulted in some improvement but on November 4, 1997, Dr. Herr decided surgery was

needed. The surgery was performed on November 17, 1997, and it was successful. (CX-12, pp. 278-280, 351). Dr. Herr testified Claimant did well in post-operative physical therapy for two to three months, but then reached a plateau and did not improve. Dr. Herr did not have an explanation for this, but testified he thought Claimant genuinely wanted to get better. (CX-12, pp. 283-285).

By March 1998, Claimant had full range of motion and regained strength in his left upper extremity, therefore he was taken off of physical therapy. (CX-12, pp. 285-286). However, in April 1998, Claimant's pain increased, which Dr. Herr attributed to Claimant's brief return to work at Treasure Island. He released Claimant for light duty work, restricting him from using his left arm above his shoulder on a repetitive basis. Dr. Herr testified that on May 26, 1998, he gave Claimant permanent restrictions because Claimant was rapidly approaching MMI and already had a failed attempt at a return to work. (CX-12, pp. 287-293). However, he opined if Claimant refrained from work which aggravated his left shoulder, he could return to his March 1998 condition. Dr. Herr last saw Claimant on June 18, 1998, at which time he opined Claimant had reached MMI and gave him a work release for permanent light duty work. Dr. Herr completed a "work restriction evaluation" on June 9, 1998 with a 10-20 pound lifting restriction above shoulder height on an intermittent basis. (CX-12, p. 394). He stated that future medical evaluation would be appropriate if symptoms so warrant. (CX-12, pp. 296-298, 307).

James A. Turner, M.D.

Dr. Turner is an orthopedic surgeon who specializes in shoulder, hand, wrist and elbow surgery. He evaluated Claimant on November 20, 1998, at the request of Employer/Carrier. Claimant informed Dr. Turner of his work-related accident on August 28, 1997, in which he fell out of bed and landed on his left shoulder. (CX-4, p. 37). He presented with weakness in his left arm and pain in his left shoulder when he lies on his left side and when he raises or lowers his left arm. Claimant also complained of left shoulder pain when leaning on his left elbow and mild crepitus. (CX-4, pp. 43-44).

Dr. Turner was provided with Claimant's medical records, which did not include his September 1997 MRI nor Dr. Herr's operative report. Based on the medical records and his physical examination of Claimant, Dr. Turner diagnosed Claimant with a contusion of the shoulder with rotator cuff tear (per Claimant's history) due to his injury of August 28, 1997. Dr. Turner agreed

with Dr. Herr's MMI date of June 18, 1998. He stated that since Claimant reported no other shoulder problems, the rotator cuff tear was more likely than not the result of his work accident. (CX-4, pp. 44-45). Dr. Turner computed and assigned a 17% impairment of the left upper extremity pursuant to the AMA Guidelines and a 10% impairment to the whole person. (CX-4, p. 46). Dr. Turner opined Claimant is permanently disabled and stated he should be permanently restricted from doing work at or above shoulder level and should lift no more than ten pounds with his left upper extremity. (CX-4, p. 49).

Rena M. Nora, M.D.

Dr. Nora is a board-certified psychiatrist and a fellow of the American Psychiatric Association of Psychiatry and Neurology. She is a clinical professor of psychiatry at the University of Nevada School of Medicine and has been a practicing psychiatrist for twenty-six years. She has been Chief of Psychiatry for the Veteran's Administration for 26 years. Dr. Nora was accepted as an expert in the field of psychiatry. (Tr. 20-21; CX-9, p. 222).

Dr. Nora began treating Claimant in March 1999, at which time she diagnosed him with a mood disorder including chronic depression and anxiety related to his problems with unemployment, worker's compensation and the present claim. She later discovered he also suffered from post-traumatic stress disorder (PTSD) which had an onset following his military service in Vietnam. Claimant's PTSD symptoms included insomnia, anxiety and depression, but for thirty years following his military service they were not "pronounced or obvious" enough to impair Claimant's day-to-day functions. The PTSD was not "dysfunctional" and did not impair his employment capacity and his day-to-day functioning. (Tr. 21-22). Dr. Nora opined that in the overall picture, Claimant's shoulder injury did not cause his PTSD, "but certainly exacerbated the depression and the anxiety," and his subsequent loss of work "certainly aggravated" his PTSD. (Tr. 22-23; CX-9, pp. 223-224).

On cross-examination, Dr. Nora stated Claimant's PTSD was combat-related, according to Claimant's accounts which were validated by the records of the functions of his unit and experiences in the military. (Tr. 32). She testified Claimant was honorably discharged, and acknowledged his discharge papers (DD-214) indicate his military occupational specialty was a cook. (Tr. 33-34). Dr. Nora added that being a cook does not negate Claimant was exposed to significant military stressors. In diagnosing his PTSD, she identified individual stressors which could have caused the condition and at least three to four of

those were non-cook related activities.[2] (Tr. 35). Although Claimant maintained employment steady enough to pay his bills until his industrial accident, Dr. Nora opined his PTSD symptoms had been present since his military service some thirty years before. She testified many veterans can go as long as twenty years or more before something triggers their PTSD, exacerbating the signs and symptoms. (Tr. 37). She opined Claimant had mild PTSD symptoms, but did not recognize them. (Tr. 37-38).

Dr. Nora testified Claimant's accident-related mood disorder could not be separated from his PTSD. She opined the job injury/incident exposed his depression and, had he been able to find employment, the PTSD would not have been triggered, or at least the symptoms would not have persisted for so long. (Tr. 38-39). She testified the PTSD and the mood disorder are concurrent and influence each other. While the two conditions result in different symptoms, ultimately they may not be compartmentalized because each condition aggravates the other. (CX-9, pp. 239-240). Dr. Nora stated Claimant's chances of full remission of his PTSD symptoms are unlikely despite his medications and treatment, however, resolution of his unemployment and financial problems may improve his condition. (Tr. 39).

Dr. Nora testified her practice was "relegated" to working for the Veteran's Administration as a psychiatrist but, while she may have a sensitivity for combat-related problems, it does not preclude her from seeing what else is happening in the veterans' lives. She stated she treats the veterans as a whole individual, including their marriage and work problems, not just for their combat or military-related problems. Dr. Nora noted Claimant also had problems with his children, wife and parents, which she opined were also exacerbated by his unemployment. (Tr. 36-37).

Dr. Nora testified Claimant's depression always seemed to be related to his unemployment and the subsequent helplessness, hopelessness and low self-esteem related thereto. Claimant had

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[2] The PTSD diagnosis is supported by the uncontradicted testimony of Claimant and the Veteran's Administration's medical records which indicate Claimant reported to Dr. Nora he was assigned to the 93rd battalion as an infantryman and spent the final eight months of his one-year tour in this position. He reported experiencing many traumatic events to include witnessing his friends die in action and seeing the bodies of dead Vietnamese boys floating in water, the result of dynamite exploding in fishing water. (EX-14, pp. 36-39).

periods of extreme depression where he would not get out of bed for days, as well as periods of partial remission. Dr. Nora opined Claimant's depression was mild to moderate at the time of the hearing but, at times before, had been severe. (Tr. 23-24). His depression has affected his ability to socialize, evident in his isolation from family and friends and his non-connections with classmates in his vocational rehabilitation program. (Tr. 24). In her deposition, Dr. Nora testified Claimant's depression also has affected his confidence, interest and motivation for school and returning to work. (CX-9, pp. 227-229).

On cross-examination, Dr. Nora acknowledged Claimant had been receiving temporary total disability benefits during the period of his unemployment, but she added these payments were not secure income because Claimant did not know when they would be terminated and he became suicidal when the payments were late. Dr. Nora assumed whatever amount he was receiving in disability benefits was significantly less than what he earned or he would not have become so depressed and frustrated with his unemployment. (Tr. 42-43). She also acknowledged that at the time she first saw Claimant in March 1999, he was in training at the Art Institute and was not even searching for a job. She stated his mood disorder was originally related to legal problems regarding his worker's compensation claim, not just his finding a job. (CX-9, pp. 243-244).

Dr. Nora testified Claimant would be able to find employment if it was the "right fit" for him. The position would have to accommodate both his physical restrictions from his shoulder injury as well as the restrictions that stem from his psychiatric problems. The latter restrictions include avoiding places with many changes, noise, stress and people milling around. Claimant needs structure and routine in his employment to prevent triggering his depression and anxiety, and losing focus and concentration on his work. (Tr. 24-26).

On March 25, 2001, Dr. Nora completed a "Work Capacity Evaluation on Psychiatric/Psychological Conditions" in which she opined Claimant may start work at six hours per workday and gradually increase to eight hours, preferably with days off within the week. She opined Claimant would achieve an eight hour day in approximately 6-12 months. She concluded Claimant could not perform his usual job as a painter because of his shoulder injury and limitations as well as his emotional and behavioral conditions. (CX-11, p. 259). Dr. Nora testified Claimant's level of concentration varies with the degree of his depression. He was able to go through job training and certification but, if his depression is severe, his concentration and motivation are low. Dr. Nora does not believe Claimant is malingering, but is

truly interested in finding employment and has actively been searching for a job. (Tr. 26; CX-9, pp. 250-251).

When questioned on cross-examination about an incident where Claimant may have skipped a job training session to see her instead, Dr. Nora testified she did not recall the occurrence but if Claimant had been having a crisis or severe turmoil, she would have recommended he visit her instead of going to the training. However, if Claimant had been having an ordinary day, she would have recommended he go to his job training. (Tr. 40-41).

On further cross-examination, Dr. Nora testified she treated Claimant while he was taking classes at the Art Institute and that it was a struggle for him to complete his training and he almost gave up many times. He was able to continue and finish, receiving high marks in some classes but failing others. Dr. Nora testified she received this information from Claimant and his vocational rehabilitation counselors. (Tr. 30-31). At her deposition, she testified problems and delays with Claimant's training, especially the lack of continuity and delays in the submission of reports, affected his depression and anxiety. Dr. Nora specifically noted Claimant was apprehensive about finding a job because he felt his training was inadequate and that he needed one more year of school to be marketable. (CX-9, pp. 224-229). Nonetheless, she encouraged him to continue his job search not only to resolve his financial problems, but for therapeutic reasons as well. (CX-9, pp. 233-234). Dr. Nora stated she would be supportive if Claimant found a job, and whether that job was a "good fit" would be up to Claimant to decide, based on his knowledge of what is good for him and what is not. (Tr. 31-32). She reiterated whatever job he takes would need to consider both his physical and emotional, psychiatric conditions. (Tr. 44).

Dr. Nora saw Claimant on an average of once a month, with additional sessions if he fell into a crisis or had special concerns. Although he previously had mild depression, this was the first time Claimant sought psychiatric help. Dr. Nora testified Claimant was suicidal in that such a thought was pervasive, but he never actually devised a plan or developed a definite intent to kill himself. There were instances where she had offered hospitalization, but she never felt he needed to be involuntarily committed. (Tr. 27-28).

Dr. Nora opined Claimant is not at MMI for his psychiatric conditions. MMI will occur when his depression, anxiety, insecurity and feelings of hopelessness subside, and when he is able to function well enough to maintain employment. She stated that Claimant is on anti-depressive medication and possibly sleep

medication. (Tr. 28-29). Dr. Nora anticipates long-term treatment for Claimant's PTSD, although his work-related mood disorder may resolve itself if he finds appropriate employment. (CX-9, pp. 251-252).

Louis F. Mortillaro, Ph.D.

Dr. Mortillaro is a board-certified clinical psychologist in the State of Nevada. He was accepted as an expert in the field of clinical psychology. (Tr. 47, 50). Carrier requested that Dr. Mortillaro conduct a forensic evaluation of Claimant, which took place in January 2002. (Tr. 48; CX-22, p. 490).

Dr. Mortillaro's evaluation of Claimant included psychological tests such as the Beck Anxiety Disorder, Beck Depression Inventory 2, Minnesota Multiphasic Personality Inventory and other questionnaires he personally prepared. He also conducted a mental status exam and clinical interview, spending about one and one-half hours with Claimant. Additionally, he reviewed various records presented to him, including the depositions of Ms. Generaux-Verre, Ms. Davis, Dr. Nora and Claimant as well as extensive Veterans' Administration medical reports. The evaluation, testing and review of records resulted in Dr. Mortillaro's report dated February 25, 2002. (Tr. 48-49, 60; EX-12).

Dr. Mortillaro diagnosed Claimant with psychological factors affecting his physical condition, an assessment indicating he has difficulty in coping with medical problems. He also diagnosed Claimant with mood disorder due to medical condition, indicative of the fact Claimant had depression and anxiety secondary to a medical condition. Claimant was also diagnosed with mixed features of depression and anxiety. Dr. Mortillaro testified his diagnoses were related specifically to Claimant's industrial accident and subsequent shoulder injury, training and ability to cope. They were based on subjective and objective findings. (Tr. 50-51; CX-22, p. 495). On cross-examination, Dr. Mortillaro testified his test results were valid. The Beck depression inventory found Claimant had severe depression, while the other tests indicated only moderate to severe depression. He acknowledged Claimant has sleep and appetite disturbances, and suicidal tendencies. (Tr. 60-61). He also testified the mood disturbance is one which causes clinically significant distress or impairment in social, occupational or other important areas of functioning. (Tr. 62).

Dr. Mortillaro acknowledged Claimant had elements of PTSD, but did not diagnose him with PTSD. (Tr. 52-53). He was

concerned with the criteria used to reach such diagnosis and specifically stated it is a problem to identify the specific combat stressors which cause PTSD. He testified he has been informed by his "personal contacts" in the Veteran's Administration, as well as other psychiatrists and psychologists, that the Veteran's Administration is seeking to limit PTSD diagnoses due to their over-utilization. PTSD may eventually be limited to veterans who were wounded, received a Purple Heart, a Bronze Star or something similar. (Tr. 52). Dr. Mortillaro testified he diagnoses PTSD on a specific event, or events, which "would be pretty traumatic to almost anybody," such as life threatening situations. (Tr. 53).

However, on cross-examination, he stated he had no reason to discredit Claimant's account of his service-related stressors. He further stated PTSD could be caused by incidents other than combat, such as being held at gunpoint, seeing a dead body or witnessing someone being killed. (Tr. 64-65). In his deposition, Dr. Mortillaro stated an industrial injury could "light up" PTSD symptoms, but this was unlikely because the two are so different. However, he further stated "mental stress can be contributory to an increase in post-traumatic stress disorder symptoms if the individual does not have effective coping mechanisms or if the medication isn't working. It's possible to exacerbate symptoms." (CX-22, pp. 504-505).

Dr. Mortillaro testified Claimant related he needed an additional year of training before he would be able to get a job. However, he acknowledged that Ms. Generaux-Verre and Ms. Davis both stated in their reports that one year of training was sufficient for Claimant to obtain employment. Dr. Mortillaro stated their depositions indicated there was work available for Claimant had he been motivated to go out and obtain it. (Tr. 54-56). Dr. Mortillaro acknowledged Claimant was only one day short of finishing job training to work at La-Z-Boy, because he skipped the last training session to visit Dr. Nora. (Tr. 55). On cross-examination, Dr. Mortillaro stated he believes Claimant should be able to work as an interior designer, if that is Claimant's perception. He feels work is therapeutic and Claimant will benefit from a job where he earns money and feels productive. (Tr. 61-62).

Dr. Mortillaro opined Claimant has psychological issues relative to his pain management, but has achieved psychological MMI because he completed one year of job training at the Art Institute, uninterrupted by his depression or PTSD. Dr. Mortillaro identified situational stressors in Claimant's life, such as his financial and family problems, but stated these are temporary stressors related to adjustment difficulties and do not

preclude him from completing job training and establishing employment. (Tr. 56-58). On cross-examination Dr. Mortillaro stated Claimant's low self-esteem may affect his ability to look for a job. (Tr. 63).

Dr. Mortillaro opined Claimant does not have psychological stressors which prevent him from working. He testified the situational stressors "could easily have been resolved by working." (Tr. 58). He also stated Claimant appeared employable, not disheveled or with any major impairments, and felt Claimant would benefit from working. Dr. Mortillaro testified at his deposition that because Claimant successfully complete one year of training, he is psychologically able to work. (CX-22, p. 496). While Claimant's unemployment has led to a separate case of depression, Dr. Mortillaro stated there was no indication of such depression at the time of Claimant's training. He testified if Claimant had found a job, any job, these psychological conditions may never have manifested themselves. (CX-22, pp. 502-503, 522).

Dr. Mortillaro testified it is Claimant's desire for one more year of training which keeps him from seeking employment, not his psychological disorders. He stated Claimant is afraid of returning to work because he feels he is inadequately trained, thus unemployable. Dr. Mortillaro testified this may be keeping Claimant from putting forth a full and honest effort in his search for a job, acknowledging Claimant may be downplaying his unemployability in order to receive additional training. However, Dr. Mortillaro also testified Claimant is well-meaning and not malingering, rather he bases his perception on the notion that he is unemployable without one more year of job training. (CX-22, pp. 510-512; Tr. 57-59). Dr. Mortillaro defers to the vocational rehabilitation specialists for an opinion as to whether Claimant actually needs a second year of training. He opined Claimant's depression and anxiety may be connected to his desire for further training. (CX-22, pp. 500-501, 511-512). Dr. Mortillaro testified Claimant's medications are not interfering with his ability to work, and he would not place psychological job restrictions on Claimant as an interior designer. (CX-22, p. 526; Tr. 57).

The Vocational Evidence

Robin Generaux-Verre, Ph.D.

Dr. Generaux-Verre has a Bachelor's and Master's degree in psychology and a Ph.D. in human services. She is a certified rehabilitation counselor and a certified case manager. She was

certified as a counselor with the Office of Workers' Compensation Program (OWCP) at the time she was involved in this matter but has since let her certification lapse. She was accepted as an expert in the field of vocational rehabilitation counseling. (Tr. 70-72).

Dr. Generaux-Verre was referred by the OWCP to develop a vocational rehabilitation plan for Claimant. She understood Claimant had worked as a painter for Employer, earning $13.00 per hour with free housing, when he tore his rotator cuff and had to stop working. (Tr. 74). When Dr. Generaux-Verre received the referral, she also received medical reports concerning Claimant's physical restrictions. He could not reach overhead and had restrictions on lifting, but Dr. Generaux-Verre did not recall the precise pound restriction. She believed these limitations would preclude Claimant from continuing his work as a painter, however, she added the OWCP vocational coordinator had already made that determination. (Tr. 75-76).

When Dr. Generaux-Verre met with Claimant in July and August 1998, she conducted an initial evaluation and interview as well as interest and aptitude testing. She testified an injured worker's choice in future employment bears greatly on the results of these tests. In Claimant's case, the preference portion of his tests indicated he had a high interest in professional and skilled arts and it was her opinion that the testing showed interior design was an appropriate field for Claimant. Thus, interior design became the focus of Claimant's vocational rehabilitation program. (Tr. 76-77). After this initial evaluation, Claimant researched different art and design schools. He and Dr. Generaux-Verre decided the Interior Design Institute was a good choice and would offer Claimant what he needed to get back to work. (Tr. 77-78).

Dr. Generaux-Verre next developed a vocational rehabilitation program for Claimant. She felt a nine to ten month training program with extra computer-aided drafting courses (Auto-CAD) would best benefit Claimant. Dr. Generaux-Verre testified her plan was to train Claimant for a position as an entry-level interior designer/decorator. (Tr. 78-79). However, on cross-examination, she testified Claimant would not be a degreed interior designer but rather would work under a degreed interior designer or with a department store. She stated there was never a suggestion Claimant would be a fully certified interior designer, but instead he would be more like an assistant. (Tr. 113-114). Dr. Generaux-Verre testified that according to the Dictionary of Occupational Titles, the specific vocational preparation for Auto-CAD had an "SBP of 5" and

required 6-12 months of training, while an interior designer had an “SBP of 7" and required at least four years of education. She stated they did not aim for the degree interior designer vocation, but added Claimant is qualified to do design and his Auto-CAD training will provide him with greater opportunities. (Tr. 113).

The program for an entry-level interior designer was an all-inclusive one year program. Dr. Generaux-Verre had spoken with the vocational coordinator about the possibility of a two-year program because she likes her clients to have as much education as possible, but in the end it was decided one year was best for Claimant. (Tr. 79). On cross-examination, Dr. Generaux-Verre clarified she believed Claimant would be able to find a job with one year of training. (Tr. 79). She testified at her deposition, however, that she had requested a two-year program for Claimant but was denied by Mr. Steven Rosen, the rehabilitation director for the OWCP in San Francisco. (CX-7, pp. 116-117). In addition to discussions she had with Ms. Barbara Davis, the placement director for the Design Institute, Dr. Generaux-Verre conducted an independent labor market survey in the field of interior design and concluded there were an adequate number of jobs available that Claimant could obtain with one year of training. Dr. Generaux-Verre testified while an entry-level interior designer only earned $8.00-$10.00 per hour, she believed with his Auto-CAD training, Claimant could meet or exceed his pre-injury wages of $13.00 per hour. (Tr. 85-86, 104).

According to Dr. Generaux-Verre’s rehabilitation plan, Claimant went through schooling at the Interior Design Institute. Based on the monthly progress reports she received from the Institute and her conversations with school officials and Claimant, Dr. Generaux-Verre testified Claimant did well in school. (Tr. 83).

When Claimant finished the year of schooling, his rehabilitation program moved into the job placement phase. On cross-examination, Dr. Generaux-Verre testified she had little contact with Claimant after he started school and he primarily met with Miss Danise Hale, her subordinate and employment coordinator, for the duration of the program. (Tr. 84, 91, 105; CX-7, p. 87). Miss Hale and Ms. Davis both provided Claimant with job leads, either verbally or in writing, throughout a designated 90-day period. It was then Claimant’s responsibility to follow through with scheduling and attending interviews. (Tr. 84-85, 89). Dr. Generaux-Verre did not know the precise number of leads provided to Claimant, but testified it was more than five, the last being in September 2000. Neither Miss Hale or Ms.

Davis were able to place him in a job. (Tr. 92, 97). Claimant returned for a second 90-day placement period but, after that was unsuccessful, OWCP terminated their services and Ms. Davis took over his placement efforts. Dr. Generaux-Verre testified the Institute has a policy of lifetime placement services available to all students. (Tr. 102-103).

On cross-examination, Dr. Generaux-Verre testified she was not aware of any specific leads provided Claimant by Ms. Davis nor their requirements, thus she could not determine if the jobs fit within his physical restrictions or whether Claimant was qualified for such job opportunities. She acknowledged Miss Hale's report stated Claimant was actively searching for jobs in the Las Vegas, Nevada and Omaha, Nebraska job markets, but hit several road blocks because entry-level interior design positions required physical labor such as installing windows and moving furniture which he was physically restricted from performing. (Tr. 105-107, 109). Miss Hale's report indicated Claimant was making every effort to secure employment, having contacted 29 different employers. (Tr. 109-110, 115). Dr. Generaux-Verre opined Miss Hale may have recommended positions which were too heavy, but later testified Miss Hale was very competent in her work and that she did not know of any reason why Miss Hale would not have known about Claimant's physical restrictions. (Tr. 109, 118). Dr. Generaux-Verre admitted some entry-level interior design jobs may be too physical for an injured employee as they are classified light duty work. (Tr. 112).

Dr. Generaux-Verre was never provided with medical records regarding Claimant's psychological condition, and she testified Claimant never provided her with information indicating he was psychologically precluded from performing work as an interior designer. (Tr. 82-83). Over time she noticed Claimant exhibited personal problems, perhaps a psychological disorder, and she encouraged him to seek help from the Department of Veterans' Affairs, knowing he had served in Vietnam. (Tr. 97; CX-7 p. 107). Dr. Generaux-Verre stated Claimant's job placement was interrupted by his VA counseling in that he missed appointments with the Design Institute and with her office, and at times he was completely unavailable. On one occasion, Claimant indicated he did not feel capable of working; he felt no employer would consider hiring him because of all the medication he was taking. When discussions arose regarding a possible second year of training for Claimant, Ms. Nancy Wolfe, president of the Design Institute, indicated she did not want Claimant to return because he "brought the class down," however, Dr. Generaux-Verre could not explain what Ms. Wolfe meant by this. (Tr. 94-96). Claimant requested another year of training but Dr. Generaux-Verre testified at her deposition that she did not pass this request

along for approval by the Department of Labor because she felt one year was adequate training for him to obtain employment. (CX-7, pp. 100-101).

Dr. Generaux-Verre has worked with many injured veterans who suffer from psychological disorders. Normally when a medical condition interferes with the injured worker's vocational rehabilitation program, she recommends a medical "interrupt" in the program until the condition resolves. She testified at her deposition that Claimant's PTSD affected his rehabilitation training at the Design Institute. (CX-7, pp. 118-119, 127). Nonetheless, Dr. Generaux-Verre never recommended an interrupt of Claimant's vocational rehabilitation program because she believed his PTSD was not industrially-related. (Tr. 111-112; CX-7, pp. 128-129). She testified she believed Claimant was not placed because he felt he was inadequately trained and he had personal problems, including a claim of PTSD. (CX-7, pp. 96-97).

On cross-examination, Dr. Generaux-Verre testified she first became aware of Claimant's psychological issues in August or September 2000, and these issues may have interfered with his job placement efforts, although she was not aware of his specific follow-through steps or placement efforts. (Tr. 111, 115). Dr. Generaux-Verre stated Claimant generally presented "extraordinarily well dressed, well-groomed, polite [and] forthcoming with information." She thus had no reservations sending him out on interviews. She stated Claimant at times exhibited strange behavior patterns and could be "difficult," but she never thought he was "infeasible" to work as an interior designer. (Tr. 100, 117). Dr. Generaux-Verre testified she may consider a person infeasible for further placement based on their physical abilities. Under OWCP criterion, she would only make such a determination upon receiving documentation from the person's physician, psychiatrist or psychologist indicating he was unable to participate in the vocational rehabilitation program. Dr. Generaux-Verre never received such reports from Claimant's doctors and thus did not think him infeasible of being placed in an interior design job. (Tr. 98-100).

On cross-examination, Dr. Generaux-Verre further testified she had actually seen Claimant no more than ten times throughout her involvement with his case. (Tr. 105). Miss Hale dealt directly with Claimant and sent out his job leads, of which Dr. Generaux-Verre knew no details despite the fact she was Miss Hale's supervisor. The only lead of which she had knowledge was the one at La-Z-Boy. Dr. Generaux-Verre stated she did not know of a student who failed the Design Institute, but acknowledged Claimant had no experience in interior design. The only labor market survey conducted was in 1998. (Tr. 107, 115-116).

Vocational Reports

Miss Hale was an employment coordinator with Generaux Business Consultants and worked directly under the supervision of Dr. Generaux-Verre. Miss Hale compiled two reports on Claimant's rehabilitation program. The first report, dated September 6, 2000 and covering the period from July 26, 2000 to September 6, 2000, indicates Claimant was cooperative with job search efforts. Job leads were secured but Claimant was often unavailable because he worked part-time jobs through Manpower. Claimant told Miss Hale he intended to secure employment in Omaha, Nebraska when he visited on vacation because he was from there and had contacts. (CX-15, p. 416).

On September 28, 2000, Miss Hale prepared a second review of Claimant's rehabilitation program, covering the period from September 6, 2000 to September 28, 2000. She reported Claimant was actively engaged in securing employment in Las Vegas and Omaha, and had contacted 29 employers while in Omaha. However, Miss Hale noted Claimant had only entry-level experience in interior design and ran into several roadblocks. Many of the entry-level positions required physical activity from which Claimant was restricted, such as installing windows, preparing window decorations and moving furniture. Miss Hale reported that due to Claimant's physical limitations positions in furniture and home design were not appropriate for him. Feedback from interior design firms revealed they would require at least two years of experience for any position above entry-level. Furthermore, Miss Hale reported many architectural and interior design firms require more extensive CAD training. Thus, while Claimant made every effort to secure employment, Miss Hale noted he felt he needed his associate's degree to be marketable in the interior design field. (CX-13, p. 406).

David Lancaster, M.S., C.R.C.

Mr. Lancaster testified by deposition on March 27, 2002. He has a Master's degree in rehabilitative counseling and is a certified rehabilitation counselor. He has been a rehabilitative counselor since 1988 and is currently the senior vocational rehabilitation counselor with Cascade Disability Management. (CX-21, pp. 428-432). One hundred percent of Mr. Lancaster's cases are referrals from insurance carriers and employers, requesting him to provide vocational rehabilitation services to injured employees. (CX-21, p. 433).

Employer/Carrier referred Claimant to Mr. Lancaster, who saw Claimant on one occasion for a period of one hour. Mr. Lancaster

was also provided with, and reviewed, Dr. Generaux-Verre's reports and deposition, Ms. Davis' deposition and Dr. Mortillaro's reports. (CX-21, p. 434). Based on this information and his meeting with Claimant, Mr. Lancaster concluded Claimant had not made a "credible attempt" to secure employment as an interior designer. Specifically, Claimant indicated to him that he had not been actively seeking a job as an interior designer since his training with La-Z-Boy. (CX-21, p. 435). Mr. Lancaster testified Claimant felt he did not have transportation, proper clothing or sufficient training to obtain a job as an interior designer. (CX-21, p. 439). He also noted in his report that "[a]ccording to the advisors, the school only sent Claimant a couple of leads total, and is not currently sending him job leads now. The last leads he received from the school were from approximately one year ago." (EX-11, p. 4). Claimant also indicated to Mr. Lancaster that he blames his inability to find a job on his medical depression. Mr. Lancaster testified he has no expertise to comment on the affect of Claimant's depression on his job search. (CX-21, pp. 438-441).

Mr. Lancaster stated Claimant "seemed to be pointing fingers at everyone else associated with this case" instead of taking responsibility for finding a job. (CX-21, pp. 438, 473). Mr. Lancaster testified he was unaware Claimant followed-up on any job leads provided to him by Ms. Davis. However, on cross-examination, he stated it was possible Claimant attempted to secure employment on his own without telling Mr. Lancaster. In an addendum to his report, Mr. Lancaster stated a placement officer at the Institute indicated Claimant has not followed up on any of the job leads provided to him by the school and characterized his job attempts as "unmotivated." (CX-21, pp. 437, 464; EX-11, p. 8). Mr. Lancaster further testified it was his understanding, from the depositions of Dr. Generaux-Verre and Ms. Davis, that Claimant had a job at La-Z-Boy but failed to follow completely through by attending all of the training. He does not know why Claimant did not show up for the last day of training and did not discuss this with Claimant, although he admitted it is an important point. (CX-21, pp. 441-444).

Mr. Lancaster testified interior design positions should be within Claimant's physical restrictions of no repetitive use of his left arm at or above shoulder height and no lifting more than 10 pounds with his left arm. These restrictions were assigned by Dr. Turner and, in Mr. Lancaster's opinion, they restrict Claimant to only sedentary work. (CX-21, pp. 446-448). However, on cross-examination, Mr. Lancaster added that Dr. Herr had limited Claimant to light duty work. (CX-21, p. 465).

In a labor market survey prepared by Mr. Lancaster at the request of Employer/Carrier, only two out of eight employers contacted were hiring interior designers. He classified this job market as "fair." However, one employer required project management and CAD experience along with a degree or interior design experience, while the second employer required a degree plus one to three years experience. Mr. Lancaster did not know whether these employers required an associate's or a bachelor's degree, and he does not know what type of experience Claimant possesses besides his one year of training at the Institute. (CX-21, pp. 450-451, 457). Mr. Lancaster testified the specific vocational preparation for interior design, as found in the Dictionary of Occupational Titles, is level 7, "over two years, up to and including four years" of preparation. (CX-21, p. 451-452). However, in an October 3, 2000 progress report, Mr. Lancaster noted Claimant could have been employed by La-Z-Boy in his occupational goal. (EX-11, p. 14). In a revised labor market survey prepared March 26, 2002, Mr. Lancaster found three of twenty employers contacted were hiring interior designers. However, he was not aware of the educational requirements for these positions or if Claimant was qualified for any of the jobs. He noted the labor market at that time for interior designers in Las Vegas was "fair to poor." (CX-21, pp. 457-458, 487).

Mr. Lancaster testified he is reasonably familiar with what is involved in an interior design job, although he does not know what mental stress levels or work pace are involved. Mr. Lancaster did not perform objective testing on Claimant. (CX-21, pp. 455-456). However, on cross-examination, he stated he did not notice anything in Dr. Mortillaro's psychological report of Claimant which would preclude Claimant from working as an interior designer. Mr. Lancaster testified he has not seen Dr. Nora's reports, but based his opinion on the fact that Dr. Mortillaro did not conclude Claimant is precluded from vocational rehabilitation and going back to work. (CX-21, pp. 467-469).

Nancy Barbara Davis

Ms. Davis testified by deposition on June 15, 2001. She is the director of admissions and job placement at the Art Institute-Las Vegas, a job she has held since January 1997.[3] Ms. Davis received her GED in 1981 and has no college training. She stated the Art Institute offers a diploma, associate's degree and bachelor's degree in interior design, a diploma in architectural

[3] The Art Institute purchased the Interior Design Institute on April 10, 2001. (CX-8, p. 142).

drafting and an associate's degree in graphic design. (CX-8, p. 144).

Ms. Davis testified Claimant was admitted to the interior design diploma program and commenced his studies in October 1998. The program is a ten-month training program which requires students to attend classes four mornings or four evenings each week. The program is designed to train students for jobs as design assistants working for an interior designer or in a store as a sales/designer. (CX-8, pp. 147-148). Ms. Davis was aware that Claimant was going through physical rehabilitation but did not know the extent of his disability nor his physical restrictions. She testified an assistant designer is a light duty position, the only physical requirements are lifting and carrying sample books. (CX-8, pp. 149-150). On cross-examination, she presumed these books weighed under 5 pounds but did not know their exact weight. (CX-8, p. 184). Ms. Davis testified that normally students are approved by their doctors before entering the program, therefore she does not know the details of their disability restrictions. (CX-8, p. 150).

Ms. Davis testified Claimant's transcript indicates he missed twelve days of class. She met with him on October 28, 1999, after he graduated, for purposes of initial placement, but he did not present a resume to her at that time. She stated this was unusual as all students are required to submit a resume to the placement office 45 days before graduation. All students are advised of this requirement when they enroll and throughout their program, especially those who are in rehabilitation. (CX-8, p. 153; EX-9, p. 25). Ms. Davis rescheduled Claimant's appointment for November 9, 1999, which he changed to November 10, 1999, and ultimately did not show up. Claimant then requested a meeting with Ms. Davis on November 17, 1999, at which time he submitted a resume to her. Claimant cancelled their December 27, 1999 meeting. (CX-8, pp. 153-154). During this time Claimant attended orientation at La-Z-Boy Furniture, but did not attend the last day when job offers were presented. Ms. Davis testified Claimant told her he did not know jobs were offered the last day and had informed Steve Hueftle of La-Z-Boy that he would be unable to attend that day. However, she also stated Mr. Hueftle told her he was not aware Claimant would be absent and "that job was going to be presented to him on that fifth day." (CX-8, pp. 154-155).

Claimant did not contact Ms. Davis again until January 18, 2001, at which time she began sending him job leads via U.S. mail. She testified students conducting job searches normally check the book in the Art Institute's job placement office or call in for new leads, and sending Claimant his leads through the

mail was a courtesy extended to him. (CX-8, pp. 156, 166). Claimant sent Ms. Davis an updated resume on March 10, 2001, which indicated he had worked for Treasure Island after graduation as a field operations supervisor and designer. Ms. Davis testified it is not unusual for graduates to contact her multiple times for job placement assistance. (CX-8, pp. 156-158, 161).

Ms. Davis testified she does not know why Claimant has not found a job. She has not received any feedback from the employers to whom Claimant applied, but she stated this is normal. Claimant has not told her why he has not found a job. (EX-9, p. 33). The Art Institute's job placement rate is 85-90%, as measured each October. However, on cross-examination, she stated she could not pinpoint the precise percentage of graduates who find jobs. (CX-8, pp. 166, 207). Ms. Davis stated on cross-examination that graduates may not find employment because they move, stay in their current job, go back on medical leave or disappear after graduation. However, she further stated graduates of Claimant's program are highly employable and it is not uncommon for students to obtain jobs before they even graduate. She testified a second year of training at the Institute would only make Claimant eligible for a different type of job and would not increase his likelihood of securing employment. (CX-8, pp. 182-183, 189). Ms. Davis stated someone with Claimant's degree could expect to earn $8-$15 an hour, which may significantly increase in the first few years. However, on cross-examination, she testified the majority of entry-level positions pay $12-$15 per hour and many of them also pay on commission. (CX-8, pp. 166-167, 196, 203). Ms. Davis testified the primary job market for interior designers is in new construction, not home remodeling. (CX-8, p. 186).

Ms. Davis stated when Dr. Generaux-Verre contacted her about enrolling Claimant in a second year of training, she forwarded the call to Ms. Barbara Wolfe, the school's former owner and current president, because she knew Ms. Wolfe did not want Claimant back for another term. Ms. Davis testified Ms. Wolfe taught two of Claimant's courses, but also was known to substitute for teachers. She testified Ms. Wolfe did not confuse Claimant with another student, Michael Pelligrano. (CX-8, pp. 162-163, 190-191, 208).

The Contentions of the Parties

Claimant contends his psychological problems are causally related to his industrial accident and are considered injuries under the Act, thus are compensable. He argues his work-related

depression has exacerbated his combat-related post- traumatic stress disorder. Claimant asserts he has not reached maximum medical improvement for his psychological problems, evident by the fact he is still undergoing treatment with Dr. Nora. Additionally, Claimant contends Employer/Carrier failed to establish suitable alternative employment. He argues he diligently sought employment from various employers but due to the inadequacy of his training program, as well as his physical and emotional impairments, he was not able to secure said employment. Claimant contends Dr. Turner restricted him to sedentary work and Dr. Nora released him to light, part-time work with no stress. Because Employer/Carrier did not meet their burden regarding suitable alternative employment, Claimant requests permanent total disability compensation.

Employer/Carrier contend they placed Claimant in a vocational rehabilitation program approved by the Department of Labor. Furthermore, they assert they demonstrated suitable alternative employment to Claimant on numerous occasions but he failed to diligently pursue said employment. They contend they have provided Claimant with compensation, training and work opportunities, which is “everything [they] were supposed to do.” Employer/Carrier further argue Claimant’s psychiatric claim is “out of the blue” and, moreover, his post traumatic stress disorder is directly related to his military experience in Vietnam, not his industrial accident in August 1997.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff’g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of

any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary- that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id. Additionally, in cases regarding psychological impairment, the working conditions need not be unusually stressful for the impairment to be compensable; what is at issue is the effect on the claimant. A claimant's psychological impairment need only be due in-part to a work-related accident or condition to be compensable under the Act. Konno v. Young Brothers, Ltd., 28 BRBS 57, 61 (1994); Sewell v. Noncommissioned Officers' Open Mess, McChord Air Force Base, 32 BRBS 127, 128 (1998).

1. Claimant's Prima Facie Case

The parties do not dispute Claimant suffered a compensable, work-related injury to his left shoulder on August 28, 1997. Claimant asserts his subsequent unemployment and claim for workers' compensation have caused him serious psychological impairment, including depression and anxiety. Furthermore, he contends this has led to an aggravation of his post-traumatic stress disorder which had become symptomatic immediately following his military tour in Vietnam, although had not impaired his day-to-day functioning until recently.

Employer/Carrier contend Claimant's industrial accident and subsequent unemployment are unrelated to his depression and anxiety. Additionally, they assert his depression did not trigger his PTSD, therefore, the condition is not compensable under the Act.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

In the present matter, it is uncontested Claimant sustained a compensable work-related injury to his left shoulder on August 28, 1997, which left him unable to perform his normal work as a painter. Dr. Nora, Claimant's treating psychiatrist, opined his shoulder injury caused his depression and anxiety. She testified Claimant's subsequent loss of work triggered his PTSD. Dr. Nora stated it is common for PTSD to be present many years with negligible effects until something, such as Claimant's work-related depression, triggers it. She also stated the mood disorder and PTSD are intertwined and influence each other. She testified they are closely related to Claimant's unemployment, workers' compensation and the present litigation.

Dr. Mortillaro, Employer/Carrier's psychologist, also diagnosed Claimant with depression directly related to his shoulder injury. Specifically, Dr. Mortillaro diagnosed Claimant with psychological factors affecting his physical condition as well as a mood disorder due to his medical condition. These diagnoses indicate Claimant has difficulty coping with his medical problems and suffers from depression and anxiety secondary to his medical problems. While he did not opine Claimant's work-related depression triggered his PTSD, Dr. Mortillaro did testify mental stress may trigger PTSD if the

injured worker does not have effective coping mechanisms. He previously indicated Claimant has difficulty coping with his medical problems, thus intimating Claimant's work accident triggered his PTSD. Furthermore, while Dr. Mortillaro stated Claimant does not suffer from psychological conditions which impair his ability to work, he testified a mood disturbance such as Claimant's often results in "clinically significant distress or impairment in social, occupational or other important areas of functioning."

Thus, Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a harm or pain on August 28, 1997, and that his working conditions and activities on that date could have directly caused the physical harm or pain and indirectly the psychological residuals sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and psychological residuals, and the working conditions which could have cause them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's conditions were neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998).

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order

to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra, 377 F.2d at 147-148.

In the present matter, Employer/Carrier referred Claimant to Dr. Mortillaro who conducted a psychological evaluation of Claimant. Dr. Mortillaro diagnosed Claimant with mood disorders including depression and anxiety, which stem directly from his shoulder injury. Although he testified Claimant's psychological conditions do not preclude him from working as an interior designer, Dr. Mortillaro acknowledged the mood disorder seriously impairs Claimant's social, occupational and other important areas of functioning.

Dr. Mortillaro did not diagnose Claimant with PTSD because he feels the diagnosis is over-used, especially in cases concerning Vietnam veterans. He testified he bases PTSD diagnoses on specific traumatic events, although he did not thereafter discredit the egregiousness of Claimant's military experience. Dr. Mortillaro further testified an industrial accident is unlikely to aggravate PTSD because usually an accident is different from the PTSD stressors. However, he thereafter testified mental stress could aggravate PTSD, especially if Claimant does not have effective coping mechanisms. Therefore, while Dr. Mortillaro resisted a diagnosis of PTSD, he did not dispute Dr. Nora's opinion that Claimant's industrial accident and subsequent mood disorder could have aggravated his PTSD. Thus, Employer/Carrier have failed to rebut Claimant's **prima facie** case of compensable physical and psychological injuries.

3. Conclusion

In conclusion, I find Claimant has established a **prima facie** case that his industrial accident and subsequent unemployment have resulted in a psychological mood disorder, including components of depression and anxiety. I also find this disorder

has exacerbated his PTSD which has remained unproblematic since his Vietnam military experience. I base my findings on the reports and testimony of Dr. Nora, Claimant's treating psychiatrist, as well as Dr. Mortillaro, Employer/Carrier's psychologist of choice. As such, Dr. Mortillaro's opinions did not rebut or discredit those of Dr. Nora and Employer/Carrier failed to rebut the Section 20(a) presumption.

B. Nature and Extent of Disability

Having found that Claimant suffers from a compensable injury, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

C. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

The parties do not dispute Claimant's left shoulder injury reached MMI on June 18, 1998, leaving Claimant permanently disabled. Claimant further argues his psychological conditions have not reached MMI, but are on-going. Dr. Nora testified Claimant has not reached MMI with respect to his psychological disorder and will not occur until his depression, anxiety and

insecurity subside and when he can function well enough to maintain employment. She opined his mood disorder may resolve itself when he finds appropriate employment, but she anticipates treating him for PTSD long-term. However, Dr. Nora also testified Claimant's psychological condition would improve if he found employment. Thus, Claimant's condition will improve if he finds a job, yet the condition is what is inhibiting his job search in the first place.

Dr. Mortillaro, on the other hand, opines Claimant's psychological conditions have reached MMI. He testified Claimant was able to successfully complete one year of training at the Art Institute uninterrupted by his depression or PTSD. Dr. Mortillaro further opined Claimant's psychological stressors are temporary and situational in nature, and do not prevent him from completing job training and establishing employment. However, he acknowledged Claimant's low self-esteem may affect his job search and, furthermore, his mood disturbance is one which often impairs an individual's social and occupational functioning.

In weighing the foregoing opinions, I note Dr. Nora is Claimant's treating psychiatrist who has seen him on a regular basis since March 1999. Dr. Mortillaro examined Claimant on only one occasion on behalf of Employer/Carrier. Therefore, as Claimant's treating physician, I afford Dr. Nora's testimony greater weight. Nonetheless, I also note Dr. Mortillaro's testimony was contradictory at times, first stating Claimant's psychological problems did not prevent him from working, thereafter stating the mood disturbances affect his occupational and social functioning. The evidence indicates Claimant's depression and anxiety, while affecting his day-to-day functioning now, will improve and possibly resolve itself altogether when he secures employment. Therefore, Claimant's psychological condition has not become stabilized and I thus find he has not reached psychological MMI, but suffers from a temporary disability.

With regard to the extent of Claimant's disability, the parties do not dispute he is permanently totally disabled from his former job due to his left shoulder injury. Dr. Herr restricted Claimant from using his left arm repeatedly at or above shoulder level and limited lifting above shoulder level to 10-20 pounds on an intermittent basis. He testified Claimant was permanently disabled and released him for light duty work. Dr. Turner permanently restricted Claimant from using his left arm at or above shoulder level and lifting more than ten pounds with his left arm. While Mr. Lancaster classified these restrictions as sedentary, I note such restrictions apply only to Claimant's upper left extremity. Therefore, I find Dr. Herr's release for

light duty work is more indicative of Claimant's physical restrictions. Nonetheless, Claimant is unable to return to his usual job as a painter, as is conceded by the parties. As such, Claimant has established a **prima facie** case of total disability due to his shoulder injury.

Additionally, Dr. Nora testified Claimant's depression and anxiety have affected his confidence, interest and motivation for returning to work. She restricted Claimant from employment which is stressful, noisy or involves many changes and people milling around. Moreover, in her "Work Capacity Evaluation on Psychiatric/Psychological Conditions," she concluded Claimant could not return to work as a painter because of his physical and psychological/emotional conditions. As such, Claimant has established a **prima facie** case for total disability with regard to his psychological conditions.

D. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, as here, the burden of proof is shifted to employer to establish suitable alternative employment. Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 1329, 12 BRBS 660, 662 (9th Cir. 1980). Total disability becomes partial on the earliest date employer establishes suitable alternative employment, but failure to establish such employment results in a finding of total disability. Stevens v. Director, OWCP, 909 F.2d 1256, 1259 (9th Cir. 1990).

Addressing the issue of job availability, the Ninth Circuit, in which jurisdiction this matter arises, requires employers to identify specific employers with specific jobs which the claimant can perform and likely obtain. See Bunge Corp. v. Carlisle, 227 F.3d 394 (7th Cir. 2000)(wherein the court compared requirements of the Ninth Circuit with those of the First, Fourth and Fifth Circuits for employers to meet their burden of showing suitable alternative employment); Bumble Bee Seafoods, supra. Establishing that a claimant might be physically able to perform general work is not sufficient to satisfy this burden. Hairston v. Todd Shipyards Corp., 849 F.2d 1194, 1196 (9th Cir. 1988). However, this standard has been modified so that where the employer identifies only one actual position which is both suitable for and realistically available to the claimant, the burden for suitable alternative employment is met if the employer also demonstrates the general availability of similar positions. Berezin v. Cascade General, Inc., 34 BRBS 163 (2000). Moreover, "[i]n determining the employee's ability to perform possible work, the [ALJ] must consider the claimant's technical and verbal

skills, as well as the likelihood, given the claimant's age, education, and background, that he would be hired if he diligently sought the possible job." Stevens, supra. See also Edwards v. Director, OWCP, 99 F.2d 1374 (9th Cir. 1993); cert denied, 511 U.S. 1031 (1994).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co. v. Hayes, 930 F.2d 424, 430 (5th Cir. 1991). Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Hairston, supra, at 1196. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981), quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

In the present matter, Claimant's shoulder injury permanently and totally restricts him from working as a painter. The Department of Labor conducted interest and aptitude testing and ultimately placed Claimant in an interior design diploma program at the Art Institute in Las Vegas, Nevada. The one-year program trained Claimant for the position of an assistant interior designer. Claimant was also provided with extra computer-aided drafting courses to enhance his marketability. Although Dr. Generaux-Verre, Claimant's vocational rehabilitation counselor assigned by the Department of Labor, had originally requested a two-year program, she testified she was confident Claimant would be able to find a job with only one year of training. This is buttressed by Ms. Davis' testimony that the Art Institute has a placement rate of 85-90% and it is not unusual for students to receive jobs before they have graduated. Ms. Davis further testified if Claimant had one more year of training he would not necessarily be more employable, but would only qualify for a different type of job.

Claimant contends he has not found a job because employers either require more than one year of training or the job's physical requirements are beyond his restrictions. The reports of Miss Hale buttress Claimant's argument in that she noted he experienced road blocks of not being able to perform the physical requirements of entry-level interior design positions. Claimant reported to her that most employers required more experience for non-entry level, and less physical, jobs. Additionally, Miss Hale reported many architectural and design firms required more extensive CAD training than Claimant possessed.

I note that Employer/Carrier have not submitted descriptions of the entry-level interior design positions Claimant applied for. Dr. Generaux-Verre, who was in charge of Claimant's placement program, was aware of Claimant's physical restrictions but did not know any of the job requirements of the potential employers. However, she testified entry-level designer positions may be too physical for an injured employee to perform. Additionally, Mr. Lancaster identified available design jobs in his labor market survey, but they required various levels of training and experience and he did not know the details of such educational requirements nor if Claimant was so qualified. The only position which may have been offered Claimant was the La-Z-Boy job, but there are no reports of what that job entailed or if it was actually available to Claimant. Since no job descriptions were admitted into evidence, Employer/Carrier have not established **the precise nature and terms** of job opportunities available to Claimant. As such, I am unable to determine whether these positions constitute suitable alternative employment vis-a-

vis Claimant's physical and psychological capabilities, age and education.

Moreover, Claimant testified he contacted at least 29 different employers and has been actively pursuing employment since the middle of his training at the Art Institute. Miss Hale noted Claimant had made every attempt to secure employment. Dr. Nora also opined Claimant has actively pursued employment. Furthermore, although Mr. Lancaster opined Claimant did not make a valid attempt at securing employment, his labor market surveys in the field of interior design indicated the job market was "fair" in 1998 and "fair to poor" in March 2002. This evidence also tends to support Claimant's argument he actively pursued employment but was unable to secure a job.[4]

Thus, I find Employer/Carrier have failed to establish the precise nature and terms of potential jobs because they did not submit detailed descriptions of the jobs which they claim Claimant is capable of acquiring and performing. It is unclear if these positions conform to Claimant's physical and mental restrictions. Furthermore, the evidence indicates Claimant actively sought employment in a less than favorable job market and, despite high placement rates at the Art Institute, was unsuccessful in his pursuit. Therefore, Employer/Carrier have not shown these potential jobs are readily available to Claimant. Based on the foregoing, I find Employer/Carrier have not met their burden of establishing suitable alternative employment in this matter. Thus, Claimant suffers a permanent and total

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[4] The probative record evidence does not disclose any jobs offered to Claimant. Only hearsay evidence was presented through Ms. Davis that Claimant may have arguably been offered a job at La-Z-Boy, but lost it because he failed to show up the last day of orientation. Whether Claimant told Steve Hueftle of La-Z-Boy he would miss the last day, Ms. Davis stated "Steve said that he was not told that and that that job was going to be presented to him on that fifth day, but Steve never showed up for that fifth day." However, as noted, this testimony is hearsay and vague at best. As such, I cannot rely upon it in reaching any conclusions concerning Employer's burden of persuasion on suitable alternative employment. Furthermore, the record is devoid of any physical demands of the La-Z-Boy job for comparative purposes which precludes an analysis of whether it would be a suitable job for Claimant. Miss Hale emphasized that Claimant was unable to perform jobs which involved moving furniture because it exceeded his physical restrictions. Therefore, I find the La-Z-Boy job, if offered, was not suitable alternative employment for Claimant given his physical limitations.

disability.

In view of the finding that Claimant reached permanence on June 18, 1998, the record has been carefully reviewed to determine whether Claimant was totally or partially disabled thereafter. The record clearly establishes that Claimant could not return to his former job with Employer when he reached MMI on June 18, 1998. Once he established he was unable to perform his usual work, the burden shifted to Employer to demonstrate the availability of realistic job opportunities which Claimant could secure if he diligently tried. Bumble Bee Seafoods, supra.

The vocational evidence of record has been analyzed, and I find that Employer failed to show any job opportunities after June 18, 1998, which Claimant could secure. Based on the failure to show suitable alternative employment, it is determined that Claimant was permanently totally disabled from his left shoulder condition alone, thus entitling him to permanent total disability compensation benefits from June 18, 1998, and continuing thereafter.

The evidence also shows Claimant has not reached MMI for his psychological conditions and remains temporary totally disabled with respect thereto. However, when Claimant achieved permanent total disability status for his left shoulder injury alone, he was entitled to be compensated for such benefits with adjustments for cost of living. The concurrent period of disability for Claimant's psychological condition, which is temporary in nature, does not change the character of the permanent disability resulting from Claimant's left shoulder injury alone. Thus, if Claimant is permanently and totally disabled due to his physical shoulder injury standing alone, he should not be penalized because he also suffers from a temporary psychological injury. See Wilson v. Atlas Wireline Services, No. 00-60511 (5th Cir. June 1, 2001)(unpublished). I so find and conclude.

Thus, since Claimant became permanently totally disabled as early as June 18, 1998, as a result of his left shoulder injury and its residuals, he is also entitled to the addition of a cost of living increase or adjustment to his compensation benefits effective October 1, 1998. See 33 U.S.C. § 910(f); Trice v. Virginia International Terminals, Incorporated, 30 BRBS 165 (1996).

E. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

In the present matter, Claimant sought treatment from the Kwajalein Hospital before beginning regular treatment with Dr. Herr. Dr. Herr treated Claimant conservatively, first with diagnostic testing, physical therapy and steroid shots before resorting to surgery to repair the torn rotator cuff. I find this course of treatment to be reasonable and necessary to resolve his torn rotator cuff.

Since 1999, Claimant has undergone treatment with Dr. Nora for his psychiatric problems. Dr. Nora sees Claimant once a month, as well as when he experiences a psychiatric emergency. She has prescribed Claimant anti-depressive and sleep medication. Dr. Mortillaro has not refuted this course of treatment as excessive or unnecessary. As such, I find Dr. Nora's treatment of Claimant to be reasonable and necessary.

In the present matter, Employer/Carrier have been found liable for Claimant's shoulder injury and resulting mood disorder and PTSD. Accordingly, Employer/Carrier are responsible for all reasonable and necessary medical expenses related to Claimant's physical and psychological injuries.

V. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VI. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees.[5] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file

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[5] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **March 1, 2001,** the date this matter was referred from the District Director.

any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from August 28, 1997 to June 17, 1998, based on Claimant's stipulated average weekly wage of $429.76, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for permanent total disability from June 18, 1998 to present and continuing thereafter based on Claimant's stipulated average weekly wage of $429.76, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

3. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 1998, for the applicable period of permanent total disability.

4. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's August 28, 1997, work injury, including expenses associated with his residual psychological injuries, pursuant to the provisions of Section 7 of the Act.

5. Employer shall receive credit for all compensation heretofore paid, as and when paid.

6. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

7. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 15th day of August, 2002, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge